United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
Jerome F. O'Neill

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. **74-2437**

UNITED STATES OF AMERICA,

Appellee

v.

RAYMOND JOHNSON,

Appellant

Appeal from the United States District Court for the District of Vermont

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

STATEMENT OF ISSUES

Preliminary Statement

Raymond Johnson appeals from a judgment of conviction entered on October 15, 1974 in the United States District Court for the District of Vermont after a four day trial before the Honorable James S. Holden, Chief United States District Judge, and a jury.

STATEMENT OF ISSUES*

POINT I.

THERE WAS AMPLE EVIDENCE TO ALLOW THE JURY TO CONCLUDE THAT RAYMOND JOHNSON WAS GUILTY BEYOND A REASONABLE DOUBT OF CONSPIRACY TO IMPORT AND AIDING AND ABETTING IN THE IMPORTATION OF METHAMPHETAMINE

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*A Statement of Issues on behalf of the United States is included pursuant to Rule 28(b), Federal Rules of Appellate Procedure.

An indictment* bearing criminal number 74-36, filed April 4, 1974, charged the defendant Raymond Johnson in four counts with conspiring with Stephen Loewe to import quantities of methamphetamine into the United States, in violation of Title 21, United States Code, § 963 (Count I); importing approximately 1 1/2 pounds of methamphetamine into the United States, in violation of Title 21, United States Code, §§ 812, 952 and 960 and Title 18, United States Code, § 2 (Count II); possessing the same methamphetamine with the intent to distribute, in violation of Title 21, United States Code, § 841 and Title 18, United States Code, § 2 (Count III); and importing merchandise into the United States contrary to law, in violation of Title 18, United States Code, § 545 and Title 18, United States Code, § 2 (Count IV).

*A superseded indictment, Cr. No. 74-7, was filed January 10, 1974 and charged both Johnson and co-defendant Stephen Loewe. Loewe pleaded guilty to Count II of that indictment (possession with intent to distribute) on February 1, 1974, was sentenced provisionally pursuant to 18 U.S.C. § 4208(b) on April 2, 1974, and after a study, to imprisonment for three years on July 16, 1974.

Trial commenced on June 10, 1974. The Government dismissed Count IV before the case went to the jury on June 13, 1974 and the jury returned a verdict on that date finding Raymond Johnson guilty on Counts I and II and not guilty on Count III.

Post-trial motions by the defendant to arrest the judgment, for entrance of a judgment of acquittal and for a new trial were all denied by the Court in an opinion filed on October 11, 1974. (DA 48 - 55).*

At sentencing on October 15, 1974, the Court found that Raymond Johnson would benefit from treatment under the Federal Youth Corrections Act and committed him to the custody of the Attorney General for treatment and supervision for an indefinite term under the provisions of 18 U.S.C. § 5010(b) with the sentence on Counts I and II to run concurrently. Execution of the sentence was stayed pending appeal and Johnson was continued on bail of $5,000. with 10% deposited in the registry of the court.

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* DA refers to the Defendant's Appendix. Other references are as follows: GA - Government Appendix; GX - Government Exhibit.

STATEMENT OF FACTS

The Government's Case

On December 28, 1973, an automobile bearing New Hampshire license plates and driven by Stephen Loewe, with defendant Raymond Johnson as a passenger, drove into the United States from Canada at the Port of Entry at Highgate Springs, Vermont. (Tr. 24 - 26, 39). United States Immigration Inspector John R. Hurley asked the purpose of their trip to Canada and both individuals indicated that they had gone to look for motorcycle parts. (Tr. 26; GA 2). Inspector Hurley observed that Mr. Johnson seemed nervous and ill at ease and referred the automobile for a secondary Customs inspection. (Tr. 26; GA 2). Customs Inspector Richard E. Hamilton participated in the secondary inspection of the vehicle and observed what appeared to be a piece of plastic or plastic bag at the bottom of the front door cavity next to the passenger seat of the automobile where Johnson had been riding. (Tr. 28 - 30). Inspector Hamilton, assisted by Customs Inspector Walter Kiniry, removed the passenger side door panel and found a large cellophane-type bag and a second similar, smaller bag. (GX 1 and 2; Tr. 30). Hamilton removed the two bags, initialed them and gave them

to Senior Inspector Clark, the Acting Port Director. (Tr. 33 - 34, 39, 42 - 43). Senior Inspector Clark stored the evidence in the safe at the Highgate Springs office of the U.S. Customs from Friday, the day of apprehension, through Monday at which time he mailed them to the regional laboratory of the United States Customs in Boston by registered mail, return receipt requested. (Tr. 39, 45 - 46; GA 4 - 5).

Customs Inspector Walter Kiniry, who had assisted in the secondary inspection of the vehicle, brought Johnson and Loewe into the U.S. Immigration office after discovery of the plastic bags and read them their Miranda rights. Both Johnson and Loewe indicated they understood their rights. (Tr. 62 - 64, 66, 102 - 03; GA 8 - 9). Johnson and Loewe were allowed to sit next to each other prior to the arrival of Customs Agent Gary Gardner at approximately 5:00 P.M. (Tr. 28, 47, 103 - 05). Prior to the arrival of Agent Gardner and approximately thirty to forty-five minutes after they had been brought inside, Johnson stopped Inspector Kiniry and stated: "Does it matter that I am a hitchhiker?" (Tr. 107; GA 10). This was the first time Johnson had said anything about being a hitchhiker. (Tr. 107; GA 10). Special Agent Gary Gardner

of the United States Customs subsequently arrived, and after being briefed about the preceding events, proceeded to give Mr. Johnson his Miranda warnings. (Tr. 51 - 53, 90 - 91). Johnson stated that he had hitchhiked to Canada on the New York side the day before and had gone to St. Jean, Quebec. (Tr. 91 - 92). He indicated the purpose of his trip was to visit a girl whom he had met in New England the previous summer, but Johnson was very vague about the circumstances surrounding the entire visit with her. (Tr. 92 - 95). Johnson indicated he had been unable to locate the girl and also was unable to provide the names of any places he had visited or stayed. (Tr. 93 - 94). Johnson states that he did not know anything about the drugs in the car, that he had never seen Loewe before that day and had been picked up by Loewe while hitchhiking south. (Tr. 93 - 94). Johnson also stated that he had never been in Walpole, New Hampshire, Loewe's home town. Johnson subsequently was released by U.S. Customs based upon his statements, but not before reiterating his story. (Tr. 95 - 99).

Thomas Baldwin, the Chief of Police in Walpole, New Hampshire testified that he knew Johnson and that he had seen Johnson and Loewe together in the Walpole area as early as April, 1973 and specifically that they were

together in Walpole, New Hampshire in November, 1973. (Tr. 111 - 16). Customs Special Agents Haig Soghigian and Robert J. Grant testified that they arrested Johnson on January 8, 1974 in Milford, Connecticut. (Tr. 130 - 31). At that time Johnson inquired as to what the arrest was all about and upon being told that the arrest related to his entry into Vermont from Canada stated: "I have never been in Canada." (Tr. 133 - 35).

Anna Finnerty, the chemist from U.S. Customs Regional Laboratory in Boston testified that she received Government Exhibits 1 and 2 by registered mail and that they contained methamphetamine. (Tr. 139 - 40, 148).

Defendant's Case

Stephen Loewe testified that he had known Raymond Johnson for approximately ten years (Tr. 175), and that they saw each other several times a year, for a total of approximately 200 times over four years. (Tr. 176, 193 - 94; GA 12 - 13). Loewe indicated that Johnson came to his house in Walpole, New Hampshire on December 26 and that he had told Johnson that he was going to Montreal to see if he could find out about buying motorcycle parts. (Tr. 177 - 78). Loewe testified that the last time he had seen Johnson prior

to December 26 was in October or November, but definitely not in December (Tr. 249 - 50; GA 23 - 24). They drove to St. Jean Quebec where they stopped and rented a motel room, the name of which Loewe could not remember. (Tr. 179). Johnson then went to sleep and Loewe left the motel room about 2:00 in the morning without waking Johnson and went to Montreal and purchased the methamphetamine. (Tr. 180 - 81). Loewe inserted the methamphetamine in the passenger door panel of the automobile and returned to the motel where he testified Raymond Johnson was still sleeping and did not know that he had even left, as far as Loewe knew. (Tr. 182 - 83, 241 - 42). Loewe admitted that he was high, probably on methamphetamine, on the trip up and while in Montreal but did not tell Johnson this, nor that he had been to Montreal. (Tr. 237 - 38, 242 - 43, 251 - 54). Loewe and Johnson went to Montreal the next day together, looked for motorcycle parts and slept in Loewe's automobile over night in Montreal. (Tr. 244 - 47). They subsequently drove to the border and were apprehended there.

Johnson testified that he and Loewe had been close friends at times and shared common interests, (Tr. 310) and he had seen Loewe eighty to one hundred times over four years. (Tr. 333 - 34; GA 30 - 31). He indicated that he had

gone to Loewe's house in New Hampshire shortly after Christmas in 1973. (Tr. 312). He then went to Canada with Loewe and stayed at a motel in St. Jean. (Tr. 315 - 17). Johnson went to sleep at about 9:00 P.M. and slept through until the next morning. (Tr. 317 - 18). Johnson and Loewe then looked around for motorcycle shops in Montreal (Tr. 319), slept in the automobile overnight (Tr. 321), but at no time discussed drugs with Loewe. (Tr. 322). Johnson was taken out of the automobile at the border as the search was made, waited inside and ultimately raised the question of whether it made any difference that he was a hitchhiker. (Tr. 323 - 27). Johnson admitted the falsity of his earlier statements and claimed that he made them to avoid going to jail as he had in an earlier incident in New Jersey in which he and Loewe had been arrested and convicted together. (Tr. 328 - 331; GA 328 - 31). Johnson indicated that he had been to Montreal with Loewe on one prior occasion, most probably in November, 1973, (Tr. 342 - 44; GA 33 - 34), in a purple or blue Dodge. (Tr. 348). Johnson however could remember very few details of the trip. (Tr. 349 - 52).

Government's Rebuttal Case

United States Customs Inspector Harold Mercier testified that a log of secondary inspections kept at

Highgate Springs, Vermont reflected that a secondary examination was performed at 2:55 A.M. on December 9, 1973 upon a Dodge automobile. The passengers were Stephen Loewe and Raymond Johnson. (Tr. 421 - 24; GX 5; GA 1).

ARGUMENT

POINT I.

THERE WAS AMPLE EVIDENCE TO ALLOW THE JURY TO CONCLUDE THAT RAYMOND JOHNSON WAS GUILTY BEYOND A REASONABLE DOUBT OF CONSPIRACY TO IMPORT AND AIDING AND ABETTING IN THE IMPORTATION OF METHAMPHETAMINE.

Defendant Johnson contends that a fair summary of the evidence in this case of Johnson's guilt consisted merely of his presence in Loewe's automobile where the drugs were found, his close association with Loewe, a prior trip to Canada with Loewe, and the false exculpatory statements by Johnson concerning his association with Loewe. (Defendant's Brief 12).

The Government submits that even the evidence summarized was "sufficient relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that the accused is guilty." United States v. Glasser, 443 F.2d 994, 1006 (2d Cir.), cert. denied, 404 U.S. 854 (1971), quoting, American Tobacco Co. v. United States, 328 U.S. 781, 787 (1946). See United States v. Taylor, 464 F.2d 240, 244 (2d Cir. 1972).

Moreover, this summary is based essentially upon the Government's direct case to show Johnson's

knowledge and participation in the conspiracy and importation. Once a motion for judgment of acquittal has been denied at the close of the Government's case, however, the reviewing court then may also consider the defendant's evidence and Government's rebuttal evidence to determine whether there was sufficient evidence to support a verdict of guilty by the jury. McGautha v. California, 402 U.S. 183, 215 - 16 (1971); United States v. Calderon, 348 U.S. 160, 164 & n.1 (1954); United States v. Tramunti, 500 F.2d 1334, 1338 (2d Cir. 1974).

In this context, the evidence of Johnson's involvement was overwhelming. The trial court's "Memorandum and Order" of October 11, 1974 deciding post-trial motions on the issues raised here found the proof of Johnson's involvement to be substantial. (DA 49 - 53). This evidence, as noted by the trial court, consisted of the close friendship and association of Johnson and Loewe over a period of ten years; their visits to each other on the average of twenty-five times each year, in addition to telephone calls; their arrest in New Jersey together in February 1973 on charges of transportation of stolen motorcycles; Johnson's knowledge of Loewe's conviction of motor vehicle theft in 1973 and the fact that Loewe was on

probation and was not permitted to leave the State of New Hampshire; Loewe's frequent trips to Montreal for the purpose of trafficking in controlled substances; the testimony of Loewe that he had made other trips to Canada that did not involve the transportation of controlled substances, including at least one trip Johnson accompanied him on in October or November, 1973; the denial by both Loewe and Johnson that the trip took place in December, 1973, whereas, the records of the Immigration Service established that Loewe and Johnson entered the United States from Canada at Highgate Springs on December 9, 1973; Loewe's admitted addiction to controlled substances and his frequent trips to Montreal to obtain methamphetamine; the testimony of Loewe and Johnson that Johnson had come to New Hampshire in stormy weather on December 26, 1973, following which they drove to St. Jean, Quebec and stayed in a motel; Johnson's testimony that he went to sleep at 9:00 P.M., while Loewe testified that he remained awake until about 2:00 A.M. when he departed for a pre-arranged meeting to purchase the controlled substances in Montreal, totally without Johnson's knowledge; the subsequent trip to Montreal by Loewe and Johnson on December 27, and their staying overnight in the automobile on December 28 before returning

to the United States on that date; the fact that Johnson was highly nervous and upset during the initial routine primary inspection; the methamphetamine that was found in the door next to where Johnson was seated; that Johnson and Loewe were seated together in the Customs house for a period of time, during which they could have communicated, and subsequent to which Johnson stated that he was a hitchhiker who had been picked up by Loewe; Johnson's subsequent false claim that he had gone to St. Jean, Quebec to visit a girlfriend but couldn't locate her, and did not know Loewe; the success of Johnson and Loewe at obtaining Johnson's release at the border through the use of their deceptive statements; Johnson's subsequent arrest in Milford, Connecticut on January 8, 1974 and false claim at that time that he had never been in Canada before. (DA 52 - 53).

These facts alone clearly were sufficient to support a jury verdict of guilty, but as noted by the District Court the evidence consisted of more than this:

> During the trial the credibility of both Loewe and Johnson was substantially destroyed. The jury was justified in concluding that their combined testimony of Johnson's total ignorance of Loewe's criminal activity was unworthy of belief. See United States v. Pui Kan Lam, 483 F.2d 1202, 1208 (2d Cir. 1973).

(DA 53). Johnson's lack of credibility, as noted by the

Ccurt, entitled the jury to find not only that Johnson was untruthful with respect to his knowledge of the events, but further that he in fact was aware of the importation, participated in it and was a conspirator. This Court has noted previously:

> In addition, the jury could well have regarded Arcuri's and Cimei's version of what went on at the diner as so incredible as to furnish still further support. Cf. Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).

United States v. Arcuri, 405 F.2d 691, 695 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969)(footnote omitted); see United States v. Tramunti, 500 F.2d 1334, 1338 (2d Cir. 1974), pet. for cert. filed, 43 U.S.L.W. 3139 (U.S. Sept. 10, 1974); United States v. Pui Kan Lam, 483 F.2d 1202, 1208 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974). The testimony of Loewe and Johnson that they were close associates and the testimony of Loewe that he made numerous trips to Canada to purchase controlled substances and was addicted to methamphetamine rendered Johnson's statement that he knew nothing about Loewe's activities and the middle of the night trip to Montreal totally incredible. The same may be said of the testimony of Loewe that he went to Montreal, purchased the methamphetamine and returned without awakening Johnson or telling him about it. These false

statements were appropriate for the jury to consider as evidence of Johnson's guilty knowledge. See United States v. Castro, 476 F.2d 750, 753 (9th Cir. 1973); United States v. Cisneros, 448 F.2d 298, 305 - 06 (9th Cir. 1971); Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952). The limitation set out by Judge Learned Hand in Dyer, which indicates that "demeanor evidence" alone is insufficient to support a verdict of guilty, is not applicable here due to the strength of the other evidence, as well as the clear cut inconsistencies in Johnson's testimony and the finding of his lack of credibility by the trial court. See United States v. Cisneros, 448 F.2d at 306 n.10.

Defendant suggests that virtually the only evidence of guilt brought out by the Government in the trial was that Raymond Johnson was sitting within inches of the methamphetamine in the door panel. United States v. Lopez-Ortiz, 492 F.2d 109, pet. for rehearing en banc denied, 494 F.2d 1296 (5th Cir. 1974) and United States v. McConney, 329 F.2d 467 (2d Cir. 1964) apply and this Court should find the evidence was insufficient to support the verdict. Although mere presence in an automobile may be insufficient alone to sustain a conviction for unlawful

possession of controlled substances, as noted by the trial court, the situation here was much different. (DA 49).

Lopez-Ortiz was decided in the factual context of Customs agents observing a marihuana unloading operation taking place. The agents observed the unloading of gunny sacks of what appeared to be marihuana at night and moved in to make arrests. Lopez-Ortiz was found hiding behind a rock not far from where the arrest took place. The Fifth Circuit reversed his conviction, stating that the false exculpatory statements made by Lopez-Ortiz concerning the short time he had been in the house and other matters of this nature were insufficient for conviction. 492 F.2d at 115. The Court was particularly concerned that none of the Government witnesses had been able to put Lopez-Ortiz into the operation of unloading the truck and found that it was entirely consistent with the evidence that Lopez-Ortiz had been behind the truck when the agents moved in.

By contrast, however, Raymond Johnson was present in the automobile in which the controlled substance was imported and his false statements were multiple and much stronger than those of Lopez-Ortiz. In addition, he was a close associate of the driver of the car, who by his own admission was a drug dealer, importer and user.

(Tr. 201 - 07, GA 14 - 20). His trial testimony was generally contradictory, and his explanation of what had occurred in Canada was inherently incredible. A further consideration is that the nature of the violation in this case is different because if Johnson knew of the presence of a controlled substance in the automobile he was violating the law when he failed to disclose its presence at the border. This border entry certainly would be sufficient to establish constructive possession, while in Lopez-Ortiz there was no showing of any kind of a constructive possession. Lopez-Ortiz was decided in the Fifth Circuit, which still adheres to the rule that circumstantial evidence in a given case must exclude every reasonable hypothesis except that of guilt, which is not the standard in the Second Circuit. United States v. Taylor, 464 F.2d 240, 244 (2d Cir. 1972).

United States v. McConney, 329 F.2d 467 (2d Cir. 1964) is equally distinguishable. McConney was a Mann Act case in which the husband was convicted of bringing the wife from Connecticut to New York for prostitution purposes. McConney made a statement to agents of the FBI which could have been construed as a false exculpatory statement concerning the transportation of the wife, and although it

was shown that the statement was false in at least some manner, the Government failed to prove that other aspects of the statements were in fact false. 329 F.2d at 470. The Court specifically noted that the Mann Act required that there be an intent for the woman to engage in prostitution before the trip began, that is to say that the trip in itself was not improper if prostitution thereafter resulted unless there was an intent to engage in prostitution prior to the departure. A further difficulty with McConney is that the Government never proved that the woman had in fact traveled in interstate commerce, nor what the purpose was of her trip. 329 F.2d at 469. The violation with which Raymond Johnson was charged differs significantly from a Mann Act violation in that the mere possession of the controlled substance in the automobile and bringing it into the United States is in and of itself a violation. The Mann Act violation was not a possessory one and as such the false exculpatory statements were much less probative than those here where they show a guilty knowledge. See United States v. Lacey, 459 F.2d 86, 90 (2d Cir. 1972).

In the United States v. Terrell, 474 F.2d 872 (2d Cir. 1973) the Court noted that the actions of defendant

McDonald in providing a place where the narcotics transaction could take place, a moving automobile, together with her knowledge that the transaction was taking place was sufficient for conviction; however, the Court reversed the conviction due to the inadequacy of the aiding and abetting charge. Id. at 875 - 76.

In United States v. Steward, 45[illegible] 1203 (2d Cir. 1971) defendant Sands was the driver of an automobile in which someone else was transporting narcotics to various locations. The Court discussed his possession of the narcotics in the context of the old presumption of knowledge of importation, and noted very carefully that there was nothing to show that Sands knew of the presence of the drugs in the automobile, and further that they had been imported. The real significance here was in the lack of knowledge of the illegal importation which the old narcotics statute required.*

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*Judge Medina noted in his concurring opinion that under the limited facts present there Sand's conduct was sufficient for conviction under the revised drug statute, applicable to Johnson.

United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963) involved an individual who knew of the existence of the conpsiracy but who refused to participate in it. Raymond Johnson hardly can claim to fit into this mold when he jury could reasonably find that he knew of the presence of the methamphetamine in the automobile next to him and actually intended for it to be brought into the United States.

In United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962) defendant Machia merely accompanied another defendant who was engaged in a counterfeiting operation. Machia was along on the several visits which took place at a printing concern, however, the proof showed only that the closest he came to participation was being two to three feet away from the man who was showing the owner of the printing shop the negative that he had developed. He was charged with the making of a likeness of a United States bill, not possession of such a likeness. The possessory nature of the charges with respect to Raymond Johnson and the entry at the border clearly distinguishes it from Garguilo. The Court in Garguilo specifically noted that it would have been sufficient if Machia had

only driven the car or carried the negatives himself.*

In United States v. Kearse, 444 F.2d 62 (2d Cir. 1971) the defendant was charged with possession of goods stolen from an interstate shipment in violation of 18 U.S.C. §659. The goods were knitwear, not contraband, as is the case with methamphetamine. For this reason, even if Kearse had observed the knitwear in his presence he would not necessarily have had any reason to believe that the knitwear was stolen. Additionally, the evidence at trial showed that Kearse had no relationship to the lessees of the apartment and that he in fact maintained a residence elsewhere in Brooklyn. Raymond Johnson was in an automobile with an admitted associate, the substance involved was itself contraband, the testimony of Johnson and Loewe as to Johnson's knowledge of the methamphetamine was inherently incredible and Johnson made false exculpatory statements both at the border and when subsequently arrested.

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* A further consideration is that the Court in Casguilo reversed for a new trial on other grounds without actually finding that the evidence was insufficient, and it is clear from Judge Lumbard's concurring/dissenting opinion that he felt the evidence was sufficient. 310 F.2d at 255.

The Kearse court found that the evidence of Kearse's bare presence in the apartment and behavior was entirely consistent with his story that he was waiting for methadone. Johnson's presence in the automobile and behavior was not consistent with innocence.*

This Court has decided a number of cases which illustrate that the conduct of Raymond Johnson was sufficient for the jury to find him guilty of conspiracy and importation. In the United States v. Lacey, 459 F.2d 86 (2d Cir. 1972) the defendant was charged with possession of counterfeit bills. He tried to pass them at a supermarket and made false exculpatory statements after apprehension. This was essentially the only evidence to show that the defendant had guilty knowledge, however, the Court also noted that the jury could find him guilty simply by means of his "incredible explanations." Id. at 91. In United States v. Pui Kan Lam, 483 F.2d 1202 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974), the relevant

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* An additional distinction is that Kearse was not charged with aiding and abetting someone else, as was Raymond Johnson, but rather with the actual possession himself. 444 F.2d at 64 n.2.

question for comparison with this case was the aiding and abetting charged to one Leung Lam, as set out at 483 F.2d at 1207 - 08. Leung Lam's conduct was limited to a false exculpatory statement together with possible conduct which suggested he was a lookout. However, Judge Oakes noted in the Court's opinion that the jury could consider the inherently incredible nature of the story told by Leung Lam and stated that the inferences are to be drawn by the jury and the Court will not disturb them where a proper aiding and abetting instruction was given, as it was here. Id. at 1208.

Perhaps the best conclusion on the question of the sufficiency of the evidence is found in the "Memorandum and Order" filed October 11, 1974, by the District Judge who observed the trial:

> Giving full deference to the jury's province to determine credibility, to weigh the evidence and draw reasonable inferences from the facts presented, the triers of the fact, as just and rational men and women, were justified in their conclusion that the defendant was guilty of the conspiracy and importation counts beyond a reasonable doubt. United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972).

(DA 54); cf. United States v. Bottone, 365 F.2d 389, 392 - 93 (2d Cir. 1966).

POINT II.

THE JURY VERDICT WAS NOT INCONSISTENT, AND IN ANY EVENT, INCONSISTENT VERDICTS ARE NOT GROUNDS FOR REVERSAL.

Raymond Johnson was found guilty by the jury on Count I, the conspiracy to import charge, and Count II, aiding and abetting in the importation with Stephen Loewe. The jury found him not guilty of possession with the intent to distribute, however, this is not inconsistent, as suggested by defendant, since the jury could have found that Raymond Johnson knew the methamphetamine was in the automobile, participated in the importation and conspiracy but did not intend to aid and abet Loewe in its distribution. The distribution element is not required for conviction on either the importation or the conspiracy counts.

Further, there is no requirement that the verdicts be consistent. Each count of the indictment is regarded as a separate indictment. Dunn v. United States, 284 U.S. 390, 393 (1931); see United States v. Abrams, 427 F.2d 86 (2d Cir. 1969) cert. denied, 400 U.S. 832 (1970); United States v. Eisenman, 396 F.2d 565 (2d Cir. 1968); United States v. Taller, 394 F.2d 435 (2d Cir.), cert. denied, 393 U.S. 839 (1968).

POINT III.

JOHNSON'S STATEMENTS AT HIGHGATE SPRINGS WERE PROPERLY ADMITTED.

Defendant Johnson suggests that Miranda v. Arizona and its progeny require that an individual first be informed as to the nature of the matter being investigated and the possible charges which may be brought against him. There is nothing in Miranda to suggest such an interpretation and the Government suggests that such an interpretation is not in keeping with Miranda. The Third Circuit has examined this question and concluded that such a requirement is beyond the scope of Miranda. Collins v. Brierly, 492 F.2d 735 (3d Cir. 1974)(en banc). See United States v. Barnes, (4th Cir. Sept. 8, 1972) (unpublished). Commonwealth v. Collins, 436 Pa. 114, 259 A.2d 160 (1969) was considered by the Court in Collins v. Brierly and specifically rejected. 492 F.2d at 736.

Inspector Kiniry read Johnson his rights and explained to Johnson what was going on shortly after Johnson was brought into the Immigration office. (Tr. 103). Thereafter, when Johnson was questioned by Special Agent Gardner he had virtually the same information available to him as did the agents themselves. Johnson had seen the

plastic bags of material being taken out of the automobile, knew they had not been declared and now was being questioned. Even to the extent that it might be required that an individual be advised of possible charges against him, Johnson effectively knew as much about the situation at the time he was questioned as did his interrogators.

An examination of the waiver question raised by defendant must conclude that the District Court was correct in allowing Johnson's statements at the border to be admitted. Defendant suggests that he did not effectively waive his rights under Miranda, however, Johnson affixed his signature to the form for the purpose of indicating that he understood his rights, after taking the time to look over the form. Further, Agent Gardner told Johnson that he was willing to explain any aspect of the rights to Johnson if he did not understand them. Johnson previously had sought to give an explanation to Inspector Kiniry about his presence in the car and it was Agent Gardner's impression that Johnson wished to speak with them and given them some type of an explanation. (Tr. 82 - 83; GA 6 - 7). Agent Gardner accordingly proceeded to discuss the situation with Johnson. Johnson was an individual with a partial college education, apparently of reasonable intelligence, had prior contact with the law, indicated to Agent Gardner that he

understood his rights and that he did not have any questions, and perhaps most importantly, Johnson has not at any time ever claimed that he did not understand his rights or did not intend to waive them. In the circumstances of an individual who is eager to speak with Customs Agents, and tries to exculpate himself as Johnson temporarily succeeded in doing, a waiver clearly can be found. See United States v. Moreno-Lopez, 466 F.2d 1205 (9th Cir. 1972); United States v. Hilliker, 436 F.2d 101 (9th Cir. 1970), cert. denied, 401 U.S. 958 (1971). Other courts seem to have held implicitly that if the defendant answers questions after being adequately warned and there is an indication that he understands his rights, he has in effect waived his rights. See United States v. Floyd, 496 F.2d 982, 988 - 89 (2d Cir. 1974); United States v. Howell, 447 F.2d 114 (2d Cir. 1971); United States v. Lamia, 429 F.2d 373, 376 - 77 (2d Cir.), cert. denied, 400 U.S. 907 (1970); United States v. Mix, 446 F.2d 615 (5th Cir. 1971); United States v. Morris, 445 F.2d 1233 (8th Cir.), cert. denied, 404 U.S. 957 (1971); United States v. Osterburg, 423 F.2d 704 (9th Cir.), cert. denied, 399 U.S. 914 (1970).

While Raymond Johnson may not formally have waived the rights afforded to him by Miranda, he implicitly

did so under the circumstances and to hold otherwise would be an overly technical reading of the Supreme Court's Miranda decision, which is not in keeping with the objectives of the Supreme Court in Miranda.

POINT IV.

THE METHAMPHETAMINE WAS PROPERLY ADMITTED INTO EVIDENCE.

Defendant Johnson contends that the methamphetamine (GX 1 and 2) was inadmissible due to a gap in its custody and control. However, each of the witnesses who had any substantial contact with the substance seized testified that the substance in Court appeared to be the same as the one seized and the individual who originally seized the methamphetamine testified that his initials were on GX 1 and 2. Further, the evidence showed that the methamphetamine was removed from the door panel, turned over to the Acting Port Director John Clark, placed in the Customs safe by him, removed from the safe by him two days later and forwarded by registered mail return receipt requested to the Customs Laboratory in Boston, properly received there and analyzed. Counsel for defendant Johnson did not cross-examine Mr. Clark and there was never any serious suggestion in the trial court that someone had tampered with the evidence. The question of the difference in weights was not taken up with Mr. Clark, and it is noteworthy that he himself raised some question concerning the equipment he had used to weigh the methamphetamine. (Tr. 43-44). The question of the "gap" is irrelevant

however since Stephen Loewe testified himself to having purchased methamphetamine previously in Montreal from this source, indicated that he believed the substance to be methamphetamine and identified GX 1 and 2.* (Tr. 239, GA 22).

There is no serious question that the substance that was in the automobile on December 28, 1973 was not in fact methamphetamine, and as such the Court properly admitted it into evidence.

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* Agent Gardner also testified that he smelled the substance at the time of the seizure and smelled it again in court and it smelled the same to him.

POINT V.

THE COURT'S INSTRUCTIONS TO THE JURY WERE PROPER.

Defendant Johnson's request for an instruction that evidence of prior criminal conduct could not be considered as bearing on the guilt or innocence of Johnson was covered adequately, to the extent that an instruction of this nature is even required, by the limitations placed upon such evidence by the Court. (Tr. 473; DA 16).

Defendant's requests to charge numbered 9 and 10 are not the law in the Second Circuit as he himself admits, and in fact are applied only in the Fifth Circuit. See United States v. Taylor, 464 F.2d 240, 244 (2d Cir. 1972).

The Court's charge that false exculpatory statements are evidence of guilty consciousness was correct under the law. United States v. Tropiano, 418 F.2d 1069, 1081 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). However, defendant should not be heard to complain now since the trial court nevertheless modified its charge to indicate that false exculpatory statements "may be" evidence of guilty consciousness. (Tr. 503; DA 46).

The Court's charge to the jury concerning the knowledge of defendant Johnson with respect to the drugs in the car was proper since the jury was only told that the false exculpatory statements were "circumstances which may be weighed by you in determining whether or not the defendant knew, or should have known, that the drugs were in the car." (Tr. 478; DA 21).

Since the trial court then modified an instruction which was not in error when originally given, at Johnson's request, Johnson can not now be heard to complain. (Tr. 503; DA 46).

The Court's instruction with respect to the membership of Loewe and Johnson in the conspiracy was not prejudicial as may be seen by an examination of the Court's instruction in the transcript which suggested only that the potential members of the conspiracy were Loewe and Johnson. (Tr. 484; DA 27).

The Court's instructions to the jury with respect to conspiracy were not confusing since the only evidence of conspiracy between Loewe and Johnson presented to the jury occurred no later than December 28, 1973. The jury had to find that an overt act was committed in furtherance of the conspiracy and if they did not find the conspiracy began before that date it certainly was implicit in the instructions of the Court that the overt act could not have been in furtherance of the conspiracy.

POINT VI.

THE CONSPIRACY COUNT DID NOT MERGE INTO THE SUBSTANTIVE COUNT.

Conspiring to commit a crime is an offense separate and distinct from the crime which may be the object of the conspiracy. Pereira v. United States, 347 U.S. 1, 11 (1954); United States v. Rabinowich, 238 U.S. 78, 87 - 89 (1915); Sperdutto v. United States, 246 F.2d 729 (2d Cir. 1957). There is no merger between substantive and conspiracy counts even if the substantive offenses were committed in furtherance of the conspiracy. Dennis v. United States, 341 U.S. 494, 573 - 74 (1951) (concurring opinion); Pinkerton v. United States, 328 U.S. 640, 643 (1946).

CONCLUSION

Johnson's conviction should be affirmed.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee v. RAYMOND JOHNSON, Appellant	)	Docket No. 74-2437

CERTIFICATE OF SERVICE

I do hereby certify that on the 10th day of February, 1975, I made service of the BRIEF and APPENDIX FOR THE UNITED STATES upon Raymond Johnson, by mailing two copies of the same to his attorney of record, David A. Gibson, Esquire, 139 Main Street, Brattleboro, Vermont 05301.

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